No. _____

In The

Supreme Court of the United States

RAMZAN ALI LAKHANI,

Petitioner,

v.

ALBERTO GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The question presented is whether an alien has a constitutional right to effective assistance of counsel in removal proceedings.

2. If so, whether the Fifth Circuit's determination that an application for discretionary relief carries no due process right to effective assistance of counsel is proper, particularly in light of the fact that there is a split between the circuits on this issue.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for review is unreported. *Lakhani v. Gonzales,* No. 06-60417, 2007 WL 853178 (5th Cir. Mar. 19, 2007). (App. 1.)

The decision of a single member of the Board of Immigration Appeals, denying as untimely Respondent's March 9, 2006, motion to reopen, inasmuch as it was not filed within 90 days of the February 14, 2005 final administrative order is unreported. *Matter of Lakhani,* File A79 008 101 (BIA Apr. 13, 2006). (App. 4.)

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for review is unreported. *Lakhani v. Gonzalez*, No. 05-60204, 162 F. App'x. 350 (5th Cir. Jan. 11, 2006). (App. 19.)

The decision of the Board of Immigration Appeals denying Petitioner's motion to remand his removal proceedings for the purpose of applying for newly available relief in the form of adjustment of status, and dismissing the appeal of the Immigration Judge's decision, is unreported. *Matter of Lakhani,* File A79 008 101 (BIA Feb. 14, 2005). (App. 6.)

The decision of the Immigration Judge, denying Petitioner's application for withholding of removal, his application for withholding of removal pursuant to the Torture Convention, his application for asylum, and denying his application for voluntary departure, is unreported. *Matter of Lakhani,* File A79 008 101 (United

States Immigration Court, Houston, Texas, Nov. 5, 2003). (App. 19.)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on March 19, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. § 1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D).

APPLICABLE LAW

INA § 245(i), 8 U.S.C. § 1255, which provides: "Adjustment of status of certain aliens physically present in United States. (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States – (A) who – (i) entered the United States without inspection; or (ii) is within one of the classes enumerated in subsection (c) of this section; (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of – (i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and (C) who, in the case of a beneficiary of a petition

for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who – (i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986; (ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and (iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if – (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed."

8 C.F.R. § 1003.2(a), which provides: "General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."

8 C.F.R. § 1003.2(b)(1), which provides: "(b) Motion to reconsider. (1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

8 C.F.R. § 1003.2(c)(3), which provides: "In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings: (i) Filed

pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2); (ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing; (iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or (iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

STATEMENT OF THE CASE

Petitioner, Ramzan Ali LAKHANI, is a native and citizen of Pakistan who was admitted to the United States on or about October 19, 1998, as a non-immigrant visitor with authorization to remain in the United States until October 18, 1999. He seeks judicial review of a final order entered against him by the Attorney General of the United States, denying his motion to reopen the removal proceedings for ineffective assistance of counsel. The factual and procedural history of this case is crucial to Petitioner's appeal, and must be addressed at length.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C.

§ 1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts

Mr. Lakhani is a twenty-eight-year-old native and citizen of Pakistan, who was admitted to the United States on or about October 19, 1998 as a tourist with authorization to remain in the United States until October 18, 1999. Petitioner overstayed after this time. On April 19, 2001, Petitioner timely filed a labor certification application through his employer, which qualified him for the benefit of adjustment of status pursuant to the provisions of the LIFE Act.

Furthermore, on August 27, 2004, Petitioner married Ms. Khairunissa Lakhani, a U.S. citizen. This marriage, entered into while Petitioner's initial appeal to the BIA was pending, is at the heart of the instant matter. An explanation of the procedural history of the removal proceedings is necessary to fully understand the case currently before this Honorable Court.

C. Procedural History

The Immigration Judge denied Petitioner's application for asylum and/or withholding of removal on November 5, 2003, and an order of removal was entered against the Petitioner. (App. 29.) The essence of Petitioner's testimony was that he was threatened in Pakistan due to his adherence to the Shi'a Islam faith, and he testified to numerous incidents of harassment and persecution. An appeal from the decision of the immigration judge was

timely filed with the Board of Immigration Appeals ("BIA").

1) Administrative Review

On November 11, 2003, Petitioner timely filed his appeal through his first counsel of record to the Board of Immigration Appeals. This appeal raised numerous grounds of error, including Petitioner's eligibility to adjust his status under section 245(i) of the Immigration and Nationality Act (the Act), improper issuance of the Notice to Appear (NTA), that Petitioner established past and the probability of future persecution, and alleged error by the Immigration Judge when he failed to make a direct finding on credibility.

However, while the appeal was pending before the Board, Petitioner married a Ms. Khairunissa Lakhani, a U.S. citizen, thereby becoming eligible for relief as an immediate relative. Petitioner then hired a second attorney, Mr. William F. Harmeyer, to file the I-130 immediate relative petition and motion to remand the proceedings based upon said petition.

a) Ineffective Assistance of Counsel during Motion to Remand

On October 8, 2004, Mr. Harmeyer filed a *two-page* Motion to Remand with the BIA. The day prior to filing the Motion to Remand, Mr. Harmeyer filed an I-130 immediate relative petition and an I-485 application to adjust status on behalf of Petitioner. Unfortunately, Mr. Harmeyer filed these applications at the Houston District Office of U.S.C.I.S., despite the fact that proper procedure requires the filing of the I-130 application with the U.S.

CIS Texas Service Center; and proof of the filing of the I-130 along with the I-485 application with all supporting documents attached to the Motion to Reopen filed with the BIA, pursuant to the requirements of 8 C.F.R. § 1003.2(c)(1).

The Motion to Remand filed for Petitioner by Mr. Harmeyer failed to comply with procedures for such as established by precedent and the regulations. 8 C.F.R. § 1003.2(c)(1) clearly states:

> 1003.2(c)(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief ***must be accompanied*** by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001(p) [sic] of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he

> or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation (emphasis added).

Specifically, the case of *Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002), outlines the procedural requirements necessary to have a case remanded based upon a marriage that occurs during removal proceedings. Mr. Harmeyer was put on notice of his non-compliance with the *Velarde* standard in the opposition motion. However, as no effort was made to comply with *Velarde*, the BIA denied the Motion to Remand and dismissed the appeal on February 14, 2005. (App. 6-8.) The BIA specifically found the Motion to Remand filed by Mr. Harmeyer did not comply with the established requirements. *Id.*

2) Judicial Review: Error compounded by further ineffective assistance

Upon dismissal of the Motion to Remand and the appeal by the BIA, Mr. Harmeyer did not take the next competent step procedurally. Specifically, Mr. Harmeyer should have filed a Motion to Reconsider to correct the prior errors and comply with the *Velarde* requirements. This, however, was not done. Instead, Mr. Harmeyer denied his error to Petitioner, and advised him that a further appeal should be taken to the Court of Appeals for the Fifth Circuit. On March 15, 2005, Mr. Harmeyer appealed Petitioner's case to the Fifth Circuit, and this Petition for Review was denied on January 11, 2006. App. 7.

In the interim, Petitioner inquired with the Service on February 2, 2006 to determine the status of the I-130/I-485 application. At the appointment, Petitioner discovered

that no action had been taken on the I-130 because Mr. Harmeyer had filed it in the wrong office. No action was taken on the I-485 application because the Service Center did not have jurisdiction over the application, rather jurisdiction lied with the court. Upon the advice of the U.S.C.I.S., Petitioner's wife re-filed the I-130 petition with the correct office.

After the appointment, Petitioner filed a grievance against Mr. Harmeyer based upon his ineffective assistance during his handling of this case. Petitioner also sought out current counsel to proceed with a Motion to Reopen pursuant to *Matter of Lozada* because of Mr. Harmeyer's ineffective assistance of counsel.

3) The Motion to Reopen under *Matter of Lozada*

On March 14, 2006, Petitioner filed a Motion to Reopen under *Matter of Lozada* and/or Exceptional Circumstances in the Alternative Motion to Reopen Sua Sponte and Motion to Remand. In this Motion, Petitioner alleged that his former counsel was ineffective and did not comply with the substantive and procedural requirements of *Matter of Velarde* in order to have a case remanded when a marriage occurs during removal proceedings and while awaiting the adjudication of a pending visa petition. Petitioner further alleged that he was prejudiced by the actions of counsel, and that this Motion complied with the requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988).

a) Timeliness of Motion to Reopen based upon *Matter of Lozada*

Generally, a party is limited to a single motion to reopen, which must be filed within 90 days of the decision sought to be reopened. 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1). There are exceptions to this time limit involving *in absentia* decisions, asylum cases where country conditions have changed, and motions filed with the agreement of both parties. 8 C.F.R. §§ 1003.2(c)(3), 1003.23(b)(4). Additionally, the BIA or Immigration Judge have the authority to reopen or reconsider a case "at any time" on their own motion. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). This authority is used "sparingly," however, and reserved for "exceptional situations." *Matter of J-J-*, 21 I. & N. Dec. 976 (BIA 1997); *Matter of G-D-*, 22 I. & N. Dec. 1132 (BIA 1999). Ineffective assistance of counsel has been found to constitute "exceptional circumstances." *See Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000); *see also Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (exceptional circumstances in context of failure to appear for deportation hearing); *Matter of Grijalva*, 21 I. & N. Dec. 472 (BIA 1996). As will be demonstrated below, this case constitutes an "exceptional situation" and it should be recognized by this court where the alien received ineffective assistance of counsel. *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003); *Borges v. Gonzalez*, 402 F.3d 398 (3d Cir. 2005).

Moreover, Petitioner argued equitable tolling made the Motion to Reopen based upon ineffective assistance timely, as the Motion was filed when the Petitioner became aware of the ineffective assistance. The Second, Ninth, and Seventh Circuits have held that the filing deadlines for motions to reopen are subject to equitable tolling. *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th

Cir. 2002); *Scoop-Gonzalez v. INS*, 321 F.3d 1176, 1184, 1187-93 (9th Cir. 2001) (en banc); *Pervaiz v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). The courts have recognized that an individual can be denied the right to bring an ineffective assistance claim if they discover former counsel's incompetence only after a filing deadline has passed or after a motion to reopen has already been filed. Thus, Petitioner argued equitable tolling because he only became aware of the previous counsel's ineffectiveness when he met with current counsel, who subsequently filed a Motion to Reopen the case based upon *Matter of Lozada*.

The motion to reopen prepared and filed by Petitioner's new counsel noted that ineffective assistance of counsel can constitute an "exceptional circumstance" warranting reopening. In the case at bar, the BIA had established procedural requirements and criteria for reopening based upon claims of ineffective assistance of counsel. Because these requirements will be discussed extensively hereafter, they should be identified at this point.

b) The Motion to Reopen complied with *Matter of Lozada*

In *Matter of Lozada,* 19 I. & N. Dec. 637 (BIA 1988), the BIA recognized the possibility that an alien's due process rights could be violated by ineffective assistance of counsel, and established certain procedural prerequisites to raising such claims. The BIA requires that an alien seeking to reopen his or her proceedings due to ineffective assistance must: (1) submit an affidavit setting forth the agreement with counsel as to representation and the other relevant facts; (2) advise the attorney of the allegations of

ineffective assistance, allow the attorney to respond and submit any response; and (3) in cases where the alleged ineffective assistance may also be a disciplinary violation of applicable rules of attorney conduct, state whether a complaint has been filed with the appropriate disciplinary authorities and, if not, why not. *Matter of Lozada,* 19 I. & N. Dec. at 639; *see also, Lara v. Trominski,* 216 F.3d 487, 496 (5th Cir. 2000). Petitioner's Motion to Reopen satisfied all of the requirements of *Lozada.* (Sup. R. 22-205.)

The INS opposed Petitioner's Motion to Reopen. (Sup. R. 3.) The reason stated for opposition was that the government believed that Petitioner could not comply with the *Lozada* requirement to show government non-opposition for any reason other than *Matter of Shaar*, 21 I. & N. Dec. 541 (BIA 1996). (Sup. R. 5.) The Government stated that it would have opposed reopening based upon possible false testimony during his asylum hearing. *Id.* However, even if this ground for opposition had been raised, Petitioner would have had a waiver available for any such misrepresentation. *See* INA § 237(a)(1)(H).

4) Second Administrative Review

On April 13, 2006, the BIA denied Petitioner's Motion to Reopen asserting that the Motion was untimely. The BIA further found that equitable tolling was not warranted because it had not been established that prior counsel committed ineffective assistance. The BIA relied on *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) in stating that the clear error committed by Mr. Harmeyer represented "tactical decisions" that do not rise to the level of ineffective assistance. (App. 5.) However, the Board specifically held that the motion to reopen filed by

Petitioner in this case met all the procedural requirements of *Matter of Lozada*. (App. 4-5.)

5) Second Judicial Review

On March 19, 2007, the United States Court of Appeals, Fifth Circuit denied the Petitioner's Petition for Review of an Order of the BIA. (App. 3.) The Fifth Circuit determined that the Petitioner's "ineffective assistance of counsel claim relate[d] to the denial of his motion to remand to pursue an adjustment of status based upon his marriage to a United States citizen." (App. 2.) The court determined that since adjustment of status was a discretionary form of relief, no due process right to effective assistance of counsel existed to pursue that relief.

The court also determined that the BIA did not abuse its discretion when determining that the Motion to Reopen was untimely because the final administrative decision in Petitioner's removal proceeding was issued on February 14, 2005. (App. 3.) Petitioner's Motion to Reopen was filed on March 14, 2006. Regarding Petitioner's contention that former counsel's ineffective assistance entitled him to equitable tolling of the period for filing a Motion to Reopen, the court noted that even assuming arguendo that tolling was available to the Petitioner, he failed to establish "that the BIA abused its discretion when it determined that equitable tolling was not warranted because he had failed to establish ineffective assistance." (App. 3.)

ARGUMENT FOR ALLOWING THE WRIT

The decision of the Fifth Circuit in this case is contrary to that of another circuit court and is ill-considered with respect to the issues raised. Furthermore, even when considered in light of the precedent decisions within the Fifth Circuit, the facts of the case at bar are sufficiently divergent as to distinguish the Petitioner's claim from that of other precedent decisions, such as *Gutierrez-Morales*.

A. Due Process: The Right to Effective Assistance of Counsel

The Fifth Circuit court most recently addressed the issue of ineffective assistance of counsel in *Gutierrez-Morales v. Tom Homan,* 461 F.3d 605 (5th Cir. 2006). In this decision the court interpreted *Matter of Lozada* and whether a right to effective assistance to counsel should only apply when non-discretionary relief is sought. In *Gutierrez-Morales*, the Fifth Circuit held that in cases only involving discretionary relief, the alien's liberty interest was not in jeopardy and, thus, had no right to effective assistance of counsel. *Id.* at 610. While *Gutierrez-Morales* is consistent with *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 214-15, where the court found that an immigrant cannot complain of ineffective assistance of counsel with respect to application for discretionary relief, for lack of protected interest in such an application. These holdings are contrary to previous Fifth Circuit cases such as *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982), where the Fifth Circuit found a constitutionally protected interest in the right to be heard on an application for a type of discretionary relief, that of asylum, even though no protected right to receive such relief exists.

The Fifth Circuit's requirement that an alien's right to effective assistance of counsel only applies when non-discretionary relief is sought, is directly at odds with case law in the Ninth Circuit which has held that in order to assert ineffective assistance of counsel a petitioner must show: (1) that counsel failed to perform with sufficient competence, and (2) that the petitioner was prejudiced by counsel's performance. *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). In an unpublished decision, the Ninth Circuit granted the petition of Aaron Cortez-Herrera ("Cortez") a native and citizen of Mexico. *Cortez-Herrera v. Gonzales*, No. 04-75735, 2007 U.S. App. LEXIS 12333 (9th Cir. May 22, 2007). The court in *Cortez* noted specifically that Cortez had "established ineffective assistance of counsel at his removal hearing [and] he had a viable claim for discretionary relief." *Id.* at *2.

However, even if this Court were to find that the Fifth Circuit's interpretation of the Petitioner's due process and ineffective assistance of counsel rights was correct, the instant case is readily distinguishable. Petitioner applied for withholding of removal, a form of relief that is not discretionary, but rather is mandatory if an alien is eligible. Therefore, since non-discretionary relief is at stake in Petitioner's proceedings, he was entitled to effective assistance of counsel during his proceedings. The fact that Petitioner is now alleging ineffective assistance of counsel while seeking discretionary relief does not preclude Petitioner's right to effective assistance of counsel during the entirety of the proceedings when a mandatory, non-discretionary form of relief is in question. Therefore, based upon his request for withholding of removal, Petitioner had a right to effective assistance of counsel throughout his proceedings.

This Court has previously found that interests in discretionary benefits (relief) are to be constitutionally protected where rules and standards governed the exercise of discretion. *Jay v. Boyd*, 351 U.S. 345 (1956), *INS v. St. Cyr*, 533 U.S. 289 (2001). In *Jay v. Boyd* this court found that an "alien is entitled to a "fair hearing" on application for suspension of deportation. *Jay*, 351 U.S. at 363. In the case at bar, no less than the liberty of an individual is at stake. The fact that deportation is a serous penalty cannot be doubted. In these types of cases the Court must take great care to insure that the procedures by which a person is deprived of that liberty are met with the essential standards of fairness.

The denial of a Petitioner's appeal results in the abandonment of any pending applications for relief, thereby denying him of his Constitutionally protected right to due process of law. Finally, when these reasons are analyzed in light of the rationales espoused by the differing circuit courts of appeal, it becomes apparent that the differing interpretations of this issue are irreconcilable and require guidance from this Court. For the reasons set forth herein, the Court should find in this case that the requisite prejudice exists and the decision of the Board and Fifth Circuit in this case should be vacated.

B. The BIA and Fifth Circuit have denied Petitioner his right to procedural due process.

It is understood that aliens in removal proceedings are entitled to procedural due process. *Reno v. Flores,* 507 U.S. 292, 306 (1993). Deportation proceedings must be conducted "in accord with due process standards of fundamental fairness." *Olabanji v. INS,* 973 F.2d 1232, 1234

(5th Cir. 1992); *Bustos-Torres v. INS,* 898 F.2d 1053, 1055 (5th Cir. 1990). The essence of due process is notice and an opportunity to be heard. *Toscano-Gil v. Trominski*, 210 F.3d 470, 473 (5th Cir. 2000); *Chike v. INS,* 948 F.2d 961, 962 (5th Cir. 1991). The Sixth Circuit in *N'Diom v. Gonzales* held that it was a denial of a right where ineffective assistance of counsel occurred. *N'Diom v. Gonzales*, 442 F.3d 494, 499-500 (6th Cir. 2004).

Petitioner retained counsel to file a Motion for Remand to ensure that he would be afforded an opportunity to file for adjustment of status based upon his marriage to a U.S. citizen. Because of his former counsel's neglect and failure to follow the procedures and requirements under *Matter of Velarde* in filing a Motion for Remand, as well as the failure to properly file an I-130 petition with the correct U.S.C.I.S. office, Petitioner's right to be "heard" was utterly lost. Therefore, the proceedings were fundamentally unfair pursuant to the holdings in *Reno, Olabanji*, and *Chike*.

Petitioner's previous attorney's failure to file a proper *Matter of Velarde* Motion for Remand is analogous to the fact pattern in *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004). In *Siong* the petitioner's attorney failed to file a timely notice of appeal such that the Ninth Circuit noted that "failure to file a timely notice of appeal is obvious ineffective assistance of counsel . . . [and] '[p]rejudice is ordinarily presumed in immigration proceedings when counsel's error deprives the alien of the appellate proceeding entirely.'" *Siong,* 376 F.3d at 1037. In the case at bar, Petitioner's previous attorney's failure to conform to the requirements of a *Matter of Velarde* Motion to Remand has similarly deprived the Petitioner.

Conversely, however, the BIA and Fifth Circuit believe, as stated in its most recent decision in this case, that what happened in the case at bar was merely a tactical decision by former counsel that did not work, and as explained in *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986), a tactical decision that is unsuccessful does not rise to the level of ineffective assistance. Petitioner vehemently believes that the actions of prior counsel resulted from an ignorance of immigration law, as *there is clearly nothing tactical in a "decision" to file a procedurally defective Motion to Reopen or incorrectly file an I-130/I-485 petition at the wrong location.* The BIA's explanation that prior counsel's clearly ineffective assistance was the result of a tactical decision is inappropriate and the Fifth Circuit's acquiescence to this interpretation is misplaced in the instant case. Moreover, the protected interest at issue is Petitioner's right to effective assistance of counsel, not, as the Fifth Circuit has concluded, his right to the ultimate form of relief from removal that he is seeking.

1. Prior counsel's actions constituted *per se* prejudice.

The failure to file an application for relief or file a timely appeal may constitute *per se* prejudice in removal proceedings. Further, the filing of a defective Motion for Remand that does not comply with the requirements established by precedent should also be considered *per se* prejudice.

In *Chike v. INS*, 948 F.2d 961 (5th Cir. 1991), a pro se alien was found deportable for a narcotics conviction and appealed his case to the Board. Due to an admitted error, Chike was not served with the BIA's briefing notice, such

that the Board had an INS brief but nothing from Chike when it dismissed his appeal. In considering Chike's due process challenge, and the requirement of "substantial prejudice," the Court quoted Justice Brandeis:

> To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process.

Chike, 948 F.2d at 962 (quoting *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 157 (1923)). The Court then quickly concluded that the denial of Chike's right to submit a brief met the requisite level of prejudice.

> Even under this more stringent due process standard, Petitioner has shown that his constitutional rights were infringed. 'An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing.' . . . The opportunity to be heard is a 'root requirement' of due process. . . . By showing that he was denied the opportunity to be heard before the Board of Immigration Appeals, Petitioner has shown substantial prejudice. This defect 'impinged upon the fundamental fairness of the hearing in violation of the fifth amendment.'

Chike, 948 F.2d at 962 (internal citations omitted). This holding makes clear that the loss of the right to be heard at the BIA is *per se* substantial prejudice.

Yet, in order to establish the requisite prejudice, must Petitioner prove that he *would have won* his appeal? The precedent of this Court strongly suggest otherwise. Certainly, Chike was not required to prove that he was not

deportable, and would have won his appeal, before the lack of an opportunity to be heard was deemed prejudicial. In *United States v. Benitez-Villafuerte,* 186 F.3d 651 (5th Cir. 1999), a case involving a collateral challenge to a deportation in a subsequent criminal trial for illegal re-entry, this Court noted that a showing of "actual prejudice" was required to sustain such a collateral challenge. The Court held:

> A showing of prejudice means "there was a *reasonable likelihood* that but for the errors complained of the defendant would not have been deported.

Benitez-Villafuerte, 186 F.3d at 658-59 (emphasis added). On the other hand, if "despite the . . . errors, the proceeding 'could not have yielded a different result,'" the deportation order is valid for purposes of subsequent criminal prosecution for illegal re-entry. *Id.* at 659.

In *Anwar v. INS,* 116 F.3d 140 (5th Cir. 1997), the alien argued that the BIA's failure to extend the deadline for filing his appeal brief was a deprivation of procedural due process. This Court noted:

> In order for Anwar to show that the BIA's not extending the deadline for the filing of his brief caused him substantial prejudice, Anwar must make a prima facie showing that he was *eligible for asylum* and that he could have made *a strong showing* in support of his application.

Anwar, 116 F.3d at 144 (emphasis added). In other cases, this Court has sustained due process challenges in removal proceedings, and found the requisite prejudice upon far less than certainty.

In *Hernandez-Garza v. INS,* 882 F.2d 945 (5th Cir. 1989), this Court found a due process violation and substantial prejudice where an affidavit was admitted without any attempt to provide the affiant for cross-examination. The same result was reached in another case, where the alien's complaint about the denial of the right to cross-examination was sustained by this Court over the INS's position that he had not demonstrated sufficient prejudice. *See Olabanji,* 973 F.2d at 1235. In neither case was the alien required to affirmatively prove that the affidavit was actually false before the denial of the right to cross examine the witness was deemed prejudicial.

Whether the loss of appeal rights is *per se* prejudicial, or the requisite demonstration of prejudice is termed a "strong showing" or a "reasonable likelihood," it is clear that a guarantee of success is not required before prejudice is found. Petitioner was prevented from having his case remanded because of the neglect and failure to follow procedures from his former counsel. It is respectfully submitted that Mr. Lakhani has a "reasonable likelihood" of demonstrating that he is not deportable, as he is eligible for relief from removal, and that a "strong showing" is apparent from the record.

Petitioner has suffered prejudice because his arguments regarding his eligibility for a new form of relief have now been ignored by the BIA due to the failure of former counsel to diligently, properly, and accurately file a Motion to Reopen following the requirements established in *Matter of Lozada*. Petitioner would urge that his ineffective assistance of counsel wholly deprived Petitioner of his opportunity to be heard before the Immigration Judge and the BIA and was, therefore, substantial prejudice *per*

se. Chike, 948 F.2d at 962. But even if the substantial prejudice is not inherent in the failure to properly file a Motion to Reopen, the arguments Petitioner raises are substantial.

2. The BIA's and Fifth Circuit's decisions constitute clear error.

The BIA found that the actions of prior counsel were a tactical decision and that there was therefore no ineffective assistance of counsel. The Fifth Circuit accepted this contention. The Board made this conclusion despite the fact that former counsel blatantly failed to follow the requirements of *Velarde*. The Board's determination that there was no error of law was incorrect and constitutes clear error as a matter of law. Under *Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253 (BIA 2002), a properly filed Motion to Reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where: (1) the motion to reopen is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I. & N. Dec. 541 (BIA 1996), or on any other procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide; and (5) the Immigration and Naturalization Service does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I. & N. Dec. 475 (BIA 1992).

Yet, despite the fact that Petitioner was clearly eligible for reopening of his case pursuant to *Velarde*, prior counsel did not choose to follow *Velarde*, either through a

willful disregard or an ignorance of immigration law. If, solely through his own actions, counsel for an individual is able to prevent his client from receiving relief for which the client is eligible, then ineffective assistance has clearly occurred. This was the case here, as there were no procedural bars to Petitioner adjusting his status if the case had been remanded. Specifically, Petitioner was grandfathered pursuant to INA § 245(i), and was not subject to the *Matter of Shaar* bar because there was no grant of voluntary departure, and he had submitted clear and convincing evidence of the *bona fide* nature of his marriage to a U.S. citizen wife pursuant to *Matter of Laureano*, 19 I. & N. Dec. 1 (BIA 1983) and *Matter of Phillis*, 15 I. & N. Dec. 385 (BIA 1975).

Thus, for these reasons, it is respectfully submitted that the BIA deprived Petitioner of procedural due process and was fundamentally unfair because the ineffective assistance of counsel prevented him from receiving a fair hearing. If he were given the opportunity, it is clear that Petitioner can make a "strong showing" that the BIA and Fifth Circuit erred in denying his claim for ineffective assistance of counsel.

C. The BIA's Denial of the Motion to Reopen was an abuse of discretion.

Finally, Petitioner would also submit that the denial of his motion to reopen qualifies as an abuse of discretion. As previously noted, an abuse of discretion occurs when the BIA acts arbitrarily, contrary to law, without rational explanation or inexplicably departs from established policies. *Diaz-Resendez v. INS,* 960 F.2d 493 (5th Cir. 1992).

In the instant case, the Board did not deny Petitioner's motion on any discretionary ground. Rather, the BIA denied the motion for legal ineligibility, holding that Petitioner could not show that the actions of his former counsel rose to the level of ineffective assistance of counsel. This Court has the ability to review a legal determination de novo. *Ghassan v. INS,* 972 F.2d 631 (5th Cir. 1992), *Ogbemudia v. INS,* 988 F.2d 595 (5th Cir. 1993).

The BIA erred when they ignored that former counsel's failure to follow the procedural requirements under *Matter of Velarde* and instead found that not curing the defect and appealing the case to another court was a tactical decision that did not rise to ineffective assistance of counsel. The deficient Motion for Remand resulted in its dismissal without consideration of Petitioner's substantive arguments and eligibility for new relief, thereby frustrating the entire purpose of the motion to the Board. In subsequently denying the Motion to Reopen filed, in essence, to correct the clear mistakes of prior counsel, the BIA and Fifth Circuit have ignored Petitioner's arguments and denied him his guaranteed right to procedural due process.

For the reasons already set forth, the Board's conclusion on the issue of ineffective assistance of counsel is contrary to law. It is respectfully submitted that it is also arbitrary and capricious, as the decision runs counter to the principles the Board established in the precedential decision of *Matter of Velarde*, which establishes the necessary requirements for a case to be remanded or reopened based upon a marriage to a U.S. citizen. Thus, this Court

should vacate the Fifth Circuit's erroneous underlying decision.

CONCLUSION

For the foregoing reasons, Petitioner contends that this Honorable Court has jurisdiction to review this matter and should vacate the decision by the Fifth Circuit and prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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2007 WL 853178

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60417
Summary Calendar

RAMZAN ALI LAKHANI,

Petitioner,

versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals
No. A79 008 101

(Filed March 19, 2007)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

Ramzan Lakhani, a native and citizen of Pakistan, petitions for review of a decision of the Board of Immigration Appeals ("BIA") denying, as untimely, his motion to reopen. He contends the BIA violated his due process

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

rights when it denied his motion to reopen based on ineffective assistance of counsel.

This court has not determined whether an alien has a constitutional right to effective counsel in removal proceedings. *Gutierrez-Morales v. Homan,* 461 F.3d 605, 609 (5th Cir. 2006). Nevertheless, we have "stated several times in dicta . . . that an alien's right to due process is violated when the representation afforded [him] was so deficient as to impinge upon the fundamental fairness of the hearing, and, as a result, the alien suffered substantial prejudice." *Id.* (internal quotation marks and citations omitted).

Lakhani's ineffective assistance of counsel claim relates to the denial of his motion to remand to pursue an adjustment of status based on his marriage to a United States citizen. An application for an adjustment of status is a request for discretionary relief and, thus, it is not a right protected by due process. *See Ahmed v. Gonzales,* 447 F.3d 433, 440 (5th Cir. 2006). Because counsel's alleged deficiencies merely restricted Lakhani's chance of obtaining discretionary relief, Lakhani had no due process right to effective assistance in pursuit of that relief. *See Gutierrez-Morales,* 461 F.3d at 609.

Lakhani also contends the BIA abused its discretion when it denied his motion to reopen based on ineffective assistance. Motions to reopen removal proceedings are disfavored, and we review the denial of a motion to reopen "under a highly deferential abuse-of-discretion standard." *Zhao v. Gonzales,* 404 F.3d 295, 303-04 (5th Cir. 2005).

A motion to reopen removal proceedings "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding

sought to be reopened." 8 C.F.R. § 1003.2(c)(2). The final administrative decision in Lakhani's removal proceeding was issued on February 14, 2005. Lakhani's motion to reopen, filed on March 14, 2006, was therefore untimely.

Lakhani contends that former counsel's ineffective assistance entitles him to equitable tolling of the period for filing a motion to reopen. Assuming *arguendo* that such tolling is available to Lakhani, he has failed to show that the BIA abused its discretion when it determined that equitable tolling was not warranted because he had failed to establish ineffective assistance. *See Zhao,* 404 F.3d at 304.

Accordingly, the BIA did not abuse its discretion in denying Lakhani's motion to reopen. The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-008-101 – Houston Date: Apr. 13, 2006

In re: LAKHANI, RAMZAN ALI *

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Afanassiev, Alexandre

ON BEHALF OF DHS: Lang, Charlotte K.,
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated February 14, 2005. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has filed a brief in opposition to the respondent's motion. As an initial matter, we find that the respondent's March 9, 2006, motion to reopen is untimely, inasmuch as it was not filed within 90 days of our February 14, 2005, final administrative order. See 8 C.F.R. § 1003.2(c). Furthermore, we do not find that equitable tolling is warranted in this matter, since the respondent has failed to establish that his prior counsel committed ineffective assistance. See Fajardo v. INS, 300 F.3d 1018 (9th Cir. 2002) (the limitation period on motions to reopen based on exceptional circumstances must be tolled until petitioner was aware of the harm resulting from attorney's misconduct). While we recognize that the respondent has complied with the requirements outlined by the Board in

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), we note that an attorney's tactical decisions in the preparation and presentation of an alien's case before the Board do not rise to the level of ineffective assistance of counsel. See Magallanes-Damian v. INS, 783 F.2d 931, 934 (9th Cir. 1986). In this matter, former counsel's decision to submit a petition for review before the United States Court of Appeals for the Fifth Circuit instead of filing a motion to reopen or reconsider with the Board was a tactical decision that does not amount to ineffective assistance of counsel. Similarly, we note that the respondent has not alleged that his prior counsel had additional documentation regarding the bona fides of his marriage that could have been submitted with his motion to remand for adjustment of status. Moreover, we are unable to find that the respondent has established that his prior counsel committed ineffective assistance before the Board, based upon his assertion that his prior counsel filed his visa petition (Form I-130) with the improper office of the DHS. Accordingly, the motion is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-008-101 – Houston Date: Feb. 14, 2005

In re: RAMZAN ALI LAKHANI

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: William F. Harmeyer, Esquire

ON BEHALF OF DHS: Charlotte K. Lang, Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Withholding of removal and Convention Against Torture

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge's decision for the reasons specified below. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

On appeal, the respondent argues that the Immigration Judge erred in failing to make a direct finding as to

credibility and in disregarding the respondent's testimony. After reviewing the record, we find that the Immigration Judge specifically found the respondent not credible, and that the inconsistencies mentioned by the Immigration Judge in support of his finding are supported by the record (I.J. 4-7). *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998). The respondent's claim that the Immigration Judge relied on the United States Department of State Country Report to support his adverse credibility finding is not supported by the record. Rather, the record reflects that the Immigration Judge cited to the Country Report as evidence that the respondent had failed to meet his burden in establishing relief under withholding of removal or the Convention Against Torture under section 241(b)(3)(A) of the Immigration and Nationality Act.

Regarding the behavior of the Immigration Judge, a review of the record does not demonstrate any particular aggressiveness on the part of the Immigration Judge, other than his. attempts to have the respondent answer the questions asked and clarify his oral and written statements. The record does not reflect that the Immigration Judge threatened the respondent with deportation if he did not admit to lying about his story. In any event, Immigration Judges are granted wide latitude in the manner in which they conduct their hearings before them, and we do not find that the immigration Judge acted improperly. *See* 8 C.F.R. §§ 1003.10,1240.32,1240.33; *Ivezaj v. INS*, 84 F.3d 215 (6th Cir. 1996) (noting no right for alien to not 'have feelings hurt by a "no-nonsense" Immigration Judge"); *Matter of Rhee*, 16 I&N Dec. 607 (BIA 1978).

Next, we decline to consider whether the Immigration Judge erred in not granting a continuance based on a pending Labor Certification Application, or whether the Immigration Court did not have jurisdiction to hear the

respondent's case because the Notice to Appear (Form I-862) was not issued by an authorized immigration officer as under 8 C.F.R. § 1239.1(a), as these issues were not properly before us. *See Matter of Jimenez,* 21 I&N Dec. 567 (BIA 1996) (issue raised on appeal, but neither raised before, nor ruled upon by the Immigration Judge considered not properly before the Board). The record does not reflect that the respondent ever requested a continuance or raised the issue of inappropriate service of the Form I-862 during the hearing. *See* Tr. at 16-17 (regarding continuance), 9, 12-13, 16 (regarding Form I-862).

Last, while the respondent's appeal was pending before the Board, he moved to remand for consideration of his application for adjustment of status based on his being the beneficiary of a filed Petition for Alien Relative (Form I-130). The record reflects that the respondent and his wife were married on August 27, 2004, which was after removal proceedings were initiated. The requirements for a motion to remand are the same as those for a motion to reopen. *See* 8 C.F.R. § 1003.2(c)(4). As there is no indication in the record or motion that the Form I-130 has been approved, we find that the respondent has not shown *prima facie* eligibility for adjustment of status. *See Matter of Arthur,* 20 I&N Dec. 475 (BIA 1992), *reaff'd Matter of H-A-,* 22 I&N Dec. 728 (BIA 1999) (motions to reopen for consideration of application for adjustment of status based upon unadjudicated visa petitions based on a marriage that was entered into after the commencement of proceedings will not be granted). Accordingly, the appeal is dismissed and motion denied.

/s/ [Illegible]
FOR THE BOARD

162 Fed.Appx. 350

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60204
Summary Calendar

RAMZAN ALI LAKHANI

Petitioner

v.

ALBERTO R. GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
No. A79 008 101

(Filed Jan. 11, 2006)

Before KING, Chief Judge, and WIENER and DEMOSS, Circuit Judges.

PER CURIAM:*

Petitioner Ramzan Ali Lakhani petitions this court for review of a final order of the Board of Immigration Appeals. For the following reasons, we GRANT the government's motion to dismiss the petition for review in part for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

lack of jurisdiction and DENY the equal protection challenge.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 19, 1998, Lakhani, a native and citizen of Pakistan, entered the United States as a non-immigrant visitor with authorization to remain for six months. Lakhani later received a six-month extension, authorizing him to remain in the United States until October 18, 1999. Since then, he has remained in the United States without authorization.

On April 19, 2001, an application of labor certification was filed with the United States Department of Labor seeking to sponsor Lakhani for employment. As required by law, Lakhani subsequently registered with the National Security Entry-Exit Registration System ("NSEERS"). On March 19, 2003, the Department of Homeland Security ("DHS") issued Lakhani a Notice to Appear ("NTA"), charging him with removability under section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B).[1]

On September 8, 2003, at his initial hearing before the Immigration Judge ("IJ"), Lakhani conceded the charges of removability. At the hearing, after the IJ asked Lakhani's counsel if he wished to designate a country of removal and received a negative reply, the following colloquy occurred:

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[1] The government, in its motion to dismiss, contends that the DHS initiated removal proceedings on April 24, 2003, with the filing of the NTA. A review of the record shows that a special agent served Lakhani with the NTA on March 19, 2003. The copy is stamped "RECEIVED" by the DHS on April 24, 2003. A.R. at 350-51; *see also id.* at 160, 167.

JUDGE: All right. In the absence of designation Court corrects removal to [Lakhani's] native country of Pakistan. And what relief would [Lakhani] be seeking?

COUNSEL: Your Honor, there's a labor certification filed in this case dated April 19th, 2001, I'm not aware at this time of any approval of a labor –

JUDGE: April –

COUNSEL: 19th –

JUDGE: – 19 of –

COUNSEL: 2001.

JUDGE: – 2001.

COUNSEL: Not aware of any approval of a labor certification at this time (indiscernible).

JUDGE: All right. What relief will you be seeking?

COUNSEL: Withholding of removal and voluntary departure in the alternative at the conclusion.

JUDGE: And is [Lakhani] declining voluntary departure – or at the completion of proceedings?

COUNSEL: Yes, Your Honor.

JUDGE: When can you file applications – any other relief first of all?

COUNSEL: No, Your Honor.

A.R. at 174-75. After hearing Lakhani's requests for withholding of removal, or in the alternative, voluntary

departure, and asking Lakhani's counsel about the relief Lakhani was seeking, the IJ proceeded to set the case for a hearing on the merits.

On October 22, 2003, Lakhani filed his application for withholding of removal. At his second hearing before the IJ on November 5, 2003, Lakhani testified before the IJ in an attempt to prove his claim for withholding of removal. During the hearing, neither Lakhani's counsel nor the government asked Lakhani questions about his application for labor certification or requested a continuance. At the conclusion of the hearing, the IJ denied Lakhani's requests for withholding of removal and voluntary departure and ordered him removed to Pakistan. The IJ concluded that Lakhani's testimony was not credible and that even if Lakhani was credible, he had failed to meet his burden of proof for the requested relief.

On November 24, 2003, Lakhani appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). In his BIA appeal, Lakhani challenged, inter alia, the IJ's failure to continue the proceedings based on Lakhani's pending labor certification application. Lakhani did not challenge the IJ's failure to continue the proceedings on due process or equal protection grounds.

On February 14, 2005, the BIA adopted and affirmed the IJ's order in a per curiam opinion. The only BIA holding relevant to Lakhani's petition for review is the BIA's decision declining to consider Lakhani's argument that the IJ erred in not granting a continuance. Specifically, the BIA found that the issue had neither been raised before nor ruled upon by the IJ. The BIA concluded that the record did not reflect that Lakhani ever requested a continuance during the hearing and determined that it

lacked jurisdiction to consider the issue. *See* A.R. at 3 (citing *Matter of Jimenez,* 21 I. & N. Dec. 567 (B.I.A. 1996) (issue raised on appeal but neither raised before nor ruled upon by the IJ not properly before the BIA)).

On March 15, 2005, Lakhani filed this timely petition for review of the BIA's decision. In his petition for review, Lakhani argues that by failing to continue the proceedings to allow him to pursue his application for adjustment of status, the IJ violated his Legal Immigration Family Equity ("LIFE") Act[2] relief rights and his due process and equal protection rights under the Fifth Amendment. On July 18, 2005, the government filed a motion to dismiss in lieu of an opening brief.

II. DISCUSSION

As a preliminary matter, the government contends that this court lacks jurisdiction to consider Lakhani's petition for review. According to the government, there is nothing in the colloquy between Lakhani's counsel and the IJ that could remotely be construed as a request by Lakhani to continue his removal proceedings. The government asserts that Lakhani was required to exhaust his continuance request before the IJ because the regulations give the IJ the discretionary authority to grant a continuance upon a showing of good cause. *See* Resp't Mot. to Dismiss at 6 (citing 8 C.F.R. § 1003.29 (2005) ("The Immigration Judge may grant a motion for continuance for good cause shown.")); *see also Witter v. INS,* 113 F.3d 549, 555 (5th Cir. 1997) ("The grant of a continuance of a deportation hearing lies within the sound discretion of the immigration judge,

[2] Pub. L. No. 106-554, 114 Stat. 2763 (2000).

who may grant a continuance upon a showing of good cause."). His failure to exhaust his administrative remedies, according to the government, precludes this court's review of his petition for review. *See* 8 U.S.C. § 1252(d)(1) (2000) (noting that a court may review a final order of removal only if the alien has exhausted all administrative remedies). Thus, the government requests that this court dismiss Lakhani's petition for review for lack of jurisdiction.

In response to the government's motion to dismiss, Lakhani argues:

> The identification of the pending labor certification as a form of relief, was, in fact, a continuance request since the only way relief could be granted on that ground was if the removal proceedings were continued in order to permit adjudication. The [IJ] overruled that request by setting the hearing on the merits without allowing a continuance.

Pet'r Resp. at 2.

We note, as an initial matter, that this court has jurisdiction to determine the proper scope of its own jurisdiction. *See Flores-Garza v. INS,* 328 F.3d 797, 802 (5th Cir. 2003); *see also Okoro v. INS,* 125 F.3d 920, 925 n.10 (5th Cir. 1997) ("When judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists. The doctrine that a court has jurisdiction to determine whether it has jurisdiction rests on this understanding.") (internal quotation marks and citation omitted). After carefully reviewing the administrative record, we conclude that we do not have jurisdiction over Lakhani's LIFE Act and due process

claims because Lakhani did not request a continuance before the IJ and thus failed to exhaust his administrative remedies.

Based on the colloquy between Lakhani's counsel and the IJ, Lakhani clearly did not request a continuance before the IJ. When asked several times by the IJ what relief Lakhani would be seeking, Lakhani's counsel identified only Lakhani's claims for withholding of removal and voluntary departure. Lakhani's counsel never asked the IJ for a continuance or implied that Lakhani was seeking a continuance to pursue rights applicable to his pending labor certification application. There is simply nothing in the record – at either the September 8, 2003 or November 5, 2003 hearing – that can be construed as a request for a continuance. Lakhani's assertion to the contrary mischaracterizes the colloquy between his counsel and the IJ and the administrative record as a whole. Because Lakhani did not request a continuance before the IJ, thus giving the IJ the discretionary authority to grant or deny the continuance pursuant to 8 C.F.R. § 1003.29, Lakhani has not exhausted his administrative remedies. In light of Lakhani's failure to exhaust his administrative remedies, we do not have jurisdiction to consider his argument that the IJ violated his LIFE Act relief rights by not continuing the proceedings. *See Cardoso v. Reno,* 216 F.3d 512, 518 (5th Cir. 2000) ("As a matter of jurisdiction, courts may not review the administrative decisions of the INS unless the appellant has first exhausted 'all administrative remedies.'") (quoting 8 U.S.C. § 1252(d)(1)); *see also Witter,* 113 F.3d at 554.

With regard to his due process challenge, Lakhani contends that the IJ's "arbitrary failure" to grant him a continuance to pursue his application for adjustment of

status violated his due process rights. As this argument is inextricably intertwined with our discussion concerning Lakhani's failure to request a continuance before the IJ (and corresponding failure to exhaust his administrative remedies), it is axiomatic that this due process challenge has no merit.[3] Accordingly, we grant the government's motion to dismiss in part for lack of jurisdiction.

We do have jurisdiction, however, to consider Lakhani's equal protection challenge. Even though Lakhani failed to raise this claim before the BIA, we retain jurisdiction to consider "substantial constitutional claims." *See* 8 U.S.C. § 1252(a)(2)(D) (noting that nothing in the provisions limiting or eliminating judicial review "shall be construed as precluding review of constitutional claims"); *see also Flores-Ledezma v. Gonzales,* 415 F.3d 375, 380 (5th Cir. 2005) (stating that the amendments under the REAL ID Act of 2005 preserve, if not expand, this circuit's settled case law that we have jurisdiction to consider "substantial constitutional claims") (internal quotation marks and citations omitted). We review constitutional challenges de novo. *See De Zavala v. Ashcroft,* 385 F.3d 879, 883 (5th Cir. 2004); *Ogbemudia v. INS,* 988 F.2d 595, 598 (5th Cir. 1993).

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[3] Even if we had jurisdiction to consider Lakhani's due process claim, Lakhani could not prevail because he is challenging the IJ's failure to continue the proceedings, which is a form of discretionary relief. *See* 8 C.F.R. § 1003.29. This court previously has determined that there is no constitutionally protected right to discretionary relief. *See Manzano-Garcia v. Gonzales,* 413 F.3d 462, 471 (5th Cir. 2005) ("[W]hat the [petitioners] presuppose is that they have a constitutionally protected right to actual discretionary relief from removal or to be eligible for such discretionary relief . . . . This is incorrect.").

Lakhani asserts that the requirement that he register under NSEERS triggered the initiation of his removal proceedings. Because NSEERS targets only non-immigrant males over age sixteen from certain targeted countries, including Pakistan, Lakhani contends that his registration with NSEERS alerted the government to his expired visa. Lakhani alleges that other aliens with pending labor certification applications who do not meet the requirements of NSEERS are not required to register and thus are not at risk of being placed in removal proceedings. According to Lakhani, such "disparate treatment" violated his equal protection rights under the Fifth Amendment.

We find no merit in Lakhani's equal protection argument. This court previously has noted that the Attorney General has broad discretion to initiate removal proceedings against aliens who violate the immigration laws of the United States. *See Cardoso,* 216 F.3d at 517 (stating that Congress has intended "to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders") (internal quotation marks and citation omitted). Lakhani does not challenge the fact that he remained in the United States beyond the expiration date of his temporary visa in violation of § 1227(a)(1)(B). Because the IJ found Lakhani removable on § 1227(a)(1)(B) grounds and not pursuant to his registration under NSEERS, we reject Lakhani's equal protection challenge.[4]

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[4] Moreover, in considering an equal protection challenge against certain nationality-sensitive provisions in the Nicaraguan Adjustment

(Continued on following page)

III. CONCLUSION

For the foregoing reasons, we GRANT the government's motion to dismiss for lack of jurisdiction in part and DENY the petition for review on Lakhani's equal protection claim. All pending motions are denied.

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and Central American Relief Act ("NACARA"), this court previously has stated:

> The core of Congress's power over immigration is the ability to set the requirements an alien must meet to qualify for admission to, or continued residence in, the United States or for naturalization as a United States citizen. Due process does not require Congress to grant aliens from all nations the same chances for admission to or remaining within the United States. Congress may permissibly set immigration criteria that are sensitive to an alien's nationality or place of origin. . . . We hold that the equal protection principles that are implicit in the Due Process Clause of the Fifth Amendment do not in any way restrict Congress's power to use nationality or place of origin as criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States.

Rodriguez-Silva v. INS, 242 F.3d 243, 248 (5th Cir. 2001); *see also Zafar v. U.S. Att'y Gen.*, 426 F.3d 1330, 1336 (11th Cir. 2005) (holding that the "[p]etitioners' equal protection rights were not violated by being required to be registered in the [NSEERS], which they argue precipitated them being placed in these *discretionary* removal proceedings by the Attorney General, where other non-Pakistani citizens were not so required to register").

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 79 008 101 November 5, 2003

In the Matter of)
)
RAMZAN ALI LAKHANI) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Withholding of removal; voluntary departure at conclusion of proceedings.

ON BEHALF OF RESPONDENT:

Rahan Ali-Muhammad, Esquire
7322 Southwest Freeway
Suite 1100
Houston, TX 77074

ON BEHALF OF DHS:

Charlotte Lang
Assistant Chief Counsel
Department of Homeland Security
Houston, TX

FINDINGS: ORAL DECISION AND ORDER

The respondent is a 25-year-old male, single, native and citizen of Pakistan, who was admitted to the United States at Miami, Florida on or about October 19, 1998, as a nonimmigrant visitor with authorization to remain in the United States, not to exceed October 18, 1999. Respondent remained in the United States beyond October 18, 1999, without authorization from the Immigration and Naturalization Service, now the Department of Homeland Security.

Based upon that violation the Government issued a charging document, Notice to Appear dated March 19,

2003, alleging the above facts and charges, and charging the respondent as removable pursuant to Section 237(a)(1)(B) of the Act. On July 28, 2003, respondent appeared pro se and conceded service of the charging document. On September 8, 2003, respondent appeared with current counsel and through counsel admitted and conceded to the allegations and charge contained in the Notice to Appear. Based upon the admission and concession by respondent through counsel, the Court finds the respondent removable as charged by clear and convincing evidence.

The respondent declined to designate a country of removal, in the absence of this, the Court directs removal to respondent's native country of Pakistan. As relief, respondent seeks withholding of removal and voluntary departure at conclusion of proceedings. Respondent specifically declined voluntary departure prior to conclusion of proceedings. Parties filed their respective supporting documents, and may be found in, the record as indicated. On November 5, 2003, respondent swore to truth and accuracy of the information contained in his application for relief, and thereafter executed his application under oath. Respondent was the only witness to testify in this case, and trial on his relief applications. It was held and completed on November 5, of 2003.

In order to establish eligibility for withholding of removal respondent bears the burden to establish that his life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership of a particular social group, or political opinion. The statutory provision requires that the respondent demonstrate a clear probability of persecution on one of the five grounds enumerated in the Act. Respondent must

demonstrate that it is more likely than not that he would be subject to persecution if returned to his native land. This is a more stringent standard than that required to establish eligibility for asylum. For asylum or withholding applications filed on or after April 1, 1997, the respondent shall also be considered for eligibility for withholding of removal under the United Nations Convention against Torture and other forms of cruel, inhuman, or degrading treatment, or punishment. Torture is defined as any act by which severe pain or suffering, whether mental or physical, is inflicted upon a person. The severe pain or suffering must be inflicted on a respondent or a third person for one or more purposes, specifically, for obtaining information or a confession for punishing for an act committed or suspected of having committed for intimidation or coercion or for any reason based on discrimination of any kind. In addition, in order to constitute torture the act must be directed against a person in the offenders custody or physical constraints. Further, the pain or suffering must be inflicted by or at the instigation of or at the consent or acquiescence of a public official or other person acting in an official capacity. Acquiescence requires that the public official have prior awareness of the activity and thereafter breech his or her legal responsibility to intervene to prevent such activity. Torture is an extreme form of cruel and inhuman treatment, and it does not include pain or suffering arising from lawful sanctions. An applicant for withholding of removal under the Torture Convention bears the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of removal.

Court has observed the demeanor of the respondent throughout these proceedings. The Court then notes by

observing the respondent's demeanor it reflects that the respondent's testimony during these proceedings were at times reflecting that some nervousness. Court notes that respondent's was holding his hands very tightly during these proceedings. Furthermore, the Court finds that respondent's testimony were contradictory in and of itself, and also contradicting to his own statement and alleged letters from friends who were with him during two incidents of threats that he received in Pakistan. In point of fact the respondent testified that in January of 1998 four men walked up to his and his friend, whom he initially claimed to be Shumsi and later changed when question as to his full name, testified that it was Arshad Qayam and he specifically spelled his last name as QAYAM. He also testified that the incident that happened in September of 1998, he was with his friend Shumsi. According to his written answer on page 5 of his application he stated that he was with Arshad Komio Shumsi at the January 1998, and that he was with Shahid Qyum at the September 1998 incident. When confronted with the contradiction the respondent simply claimed that he was confused, the Court finds that explanation to be unbelievable. Respondent had had ample opportunity to prepare for today's hearing, those were incidents that caused him to depart his home country and to seek refuge in the United States. Nevertheless, the respondent was unable to provide believable and contradictory testimony.

Further, respondent testified that the four men in January of 1998 who approached him and his friend slapped him and kicked his friend. According to his own statement on, again, page 5 of his application he testified that these four people punched him and slapped and punched his friend, and slapped and kicked him. When

confronted with the contradiction the respondent testified that it is all the same thing, but when asked specifically respondent testified that the four men actually kicked him but did not kick his friend. According to his friend's statement in tab B of Group Exhibit No. 4 Mr. Shumsi testified that they punched the respondent and slapped and kicked him, that is his friend Shumsi, and in direct contradiction of respondent's testimony. Respondent then testified the January of 1998 incident that he went out thereafter to the police station and tried to report the incident, but the police laughed at him. According to his friend's statement they were actually next to a school campus in Karachi when it happened and thought that there was a policeman standing about a 100 feet and tried to get his attention but he turned his head away, and that was also the same statement in respondent's answer on page 5 of his application, but that was not testified by the respondent. According to his friend Shumsi's statement there was no evidence that they went to the police station after that. According to respondent's testimony these four men who approached and beat him and his friend told them while they were beating him that they were from the Sunni extremists group, and according to his answer on page 5 he stated that it was only later that he found out that these men were from Sunni extremists group. According to respondent even as recently as two months that both of his friends Shumsi and Qyum had been threatened by the Sunni extremists group. According to Mr. Shumsi's statement that was submitted, indicates that he had no problem because his father is very rich and he had armed guards with him so, these Sunnis could not harm him, but they only approached him and threatened Mr. Lakhani, the respondent, that if they find Mr. Lakhani that they

would kill him but they specifically told him that they could not touch his friend Shumsi.

The respondent also testified today that upon questioning by his counsel whether or not he had gone above the police at the police station who refused to take his case, then respondent testified that yes, he went to other government offices too but the same thing happened because they were all together. It was not contained in Mr. Shumsi's statement or in respondent's application. The Court finds that he just nonchalantly added something upon the lead of his counsel. As to the September 1998 incident respondent testified, as indicated earlier, that he was his friend Shumsi, but instead in his statement and the statement of Mr. Qyum that was the incident that respondent was with Mr. Qyum and not Mr. Shumsi. Furthermore, respondent testified that after they were beaten up by these friends they drove away and respondent and his friend went home. According to his friend's statement after the incident, respondent and his friend went to the police station and reported, and the officer laughed at him and said just go away and didn't even file a report. That was the testimony of the respondent regarding the incident in January of 1998, not September of 1998.

Based upon the contradiction and the unbelievability of the respondent's testimony the Court finds that the respondent either lied to the Court during these proceedings, or he submitted letters that are made up and that are untrue and deliberately fabricated by the respondent in support of his application. Accordingly, the Court finds that the respondent had either testified falsely before the Court or that he had submitted fraudulent documents in support of his application.

Even assuming that everything that respondent testified to is true and accurate and ignoring the contradictions and giving the benefit of the doubt to the respondent, Court still finds the respondent failed to establish eligibility for relief. The two incidents that happened to the respondent are isolated incidents according to his own testimony that he was really the unlucky one, at the wrong place, at the wrong time, that there is no specific target against him. There are about 20,000,000 Shiite Muslims living in Pakistan according to the State Department *Country Report*, and there is sectarian violence between Sunnis and the Shiites but there is no evidence that the government is not trying to curtail the problems. In fact, the State Department *Country Report* indicates that the government ban on groups involving sectarian killing and violence between the rival Sunni and Shiites Muslim groups, although it continued, the number of Shiite professionals killed in Karachi and elsewhere decreased significantly. All these killings were carried out by unidentified gunmen. It seems to the Court that this violence was carried out by unidentified people, and it is of significant curiosity, as questioned by respondent's counsel, why would these people who walked up to the respondent identify themselves as Sunni extremists? If they would do that, why did not they tell them as to which extremists group they belonged to? The violence between these two groups has long been a problem in Pakistan. However, this is not one-sided violence. As the State Department *County Report* states, a Sunni prayer leader of a suburban Ouzman Gani Mosque was shot and killed by unknown assailants. A Jahan police inspector, Mohammad Jamil, was killed after conducting several successful operations against the Alaska Ejahamvi extremist group which was identified as a Sunni extremist

group. It clearly indicates that the violence is on both sides, it is not as one-sided as the respondent wished to convince the Court that this happening in Pakistan, and that simply is not true. Furthermore, the Pakistan Constitution protected religious minorities from being taxed to support the majority religion which is the Sunni religion, but no one may be forced to pay taxes for the support of any religion other than his or her own, and the State Department gave an example that the Sunni Muslims are subject to the Zakat, which is a religious tax of 2.5 per cent of their members' income. However, the Shiites, Muslims and other religious minorities do not have to pay this Zakat. Furthermore, the State Department *Country Report*, which the 5th Circuit Court of Appeals indicated is an impeccable source of background information, indicates that the government put forth efforts to stem a wave of violence between the Sunni and that Shiite sectarian violence, including mass arrests of those suspected of participating in sectarian violence, resulting in no death during the Moharam period in the year of 2002. And beginning in 2001 and throughout 2002 the government undertook major efforts to curb religious extremism and address religious intimidation of religious minorities. The government banned another five groups it suspected of inciting religious violence and Gihad, and almost 2,000 members of those five groups were arrested in the weeks following the announcement of that major effort by the Pakistani government. And in late June of 2002, authorities in Lahore arrested at least 30 members of two of the banned groups, and by the end of 2002, government excellerated its detention of members of several extremists groups. Violence in country has prompted the government on several occasions to round of [sic] hundreds of members of religious extremists groups and students at Matrazas

believed to be terrorists recruiting centers and training grounds.

In all, the record is clear that the Pakistani government is not just sitting there and laughing at people who report incidents to them, but in fact they are doing what they could to curb the sectarian violence. It is not that it is completely eliminated but considering the geographical size of Pakistan and containing 130 some million of people, the Court cannot find and conclude just from respondent's own incredible testimony that the Pakistani government is ignoring the situation. There is no evidence presented by the respondent that he had been targeted specifically based upon his religion. He cannot even tell the Court the difference between Jumakhana and a Sunni mosque other than the fact that he said they look different under a leading question by his counsel, and by saying that oh, the Jumakhana's are attended by Shiites, he cannot give anything more specific regarding his knowledge of the Shiites religion, their differences other than one prays three times and one prayed five times during the day, the Court is not certain as to whether or not this gentlemen is even a Shi'a Muslim as he tried to convince the Court.

The burden is on the respondent to establish eligibility for relief. The Court finds that he has not suffered any past persecution based upon one of the five grounds enumerated in the Act. The respondent has failed to establish any well-founded fear of future persecution, and therefore, he cannot even establish the lower burden of asylum even if he were otherwise eligible for that relief. As withholding of removal pursuant to Section 241(b)(3) of the Act requires a much higher and more objective and more stringent burden of proof, the Court finds that he

has failed to carry his burden and his application must be denied.

As to his claim for withholding of removal pursuant to the Torture Convention, there is no evidence that the government of Pakistan is targeting the respondent, to torture him. There is no evidence that he had been tortured by the Pakistani government, and the incidents that happened to him involved, according to his testimony, Sunni extremist groups. Based upon the evidence of record, these extremist groups did not act with acquiescence of Pakistani government. As such, the Court finds the respondent has failed to establish by evidence that it is "more likely than not" that the Pakistani government is interested in torturing the respondent in any way. In fact, the Court notes that there was not a scintilla of evidence that the Pakistani government is interested in the respondent in any way. Accordingly, respondent's application for withholding of removal must also be denied.

As to respondent's request for voluntary departure at conclusion of proceeding, Court has found the respondent has either testified falsely in this case, or that he had presented fraudulent documentation in support of his application. As a result, the respondent is statutorily ineligible for voluntary departure because he, by definition, fails to establish that he is a person of good moral character, even assuming that he were not otherwise found to have testified falsely. Nevertheless, the Court finds that as a matter of discretion, based upon the putting forth of testimony that was inexplicable as to the contradiction, and in and of itself against his sworn statement in the application and under penalty of perjury, and also information that was submitted by the respondent, the Court finds

that this gentleman does not deserve even this minimal form of discretionary relief.

Based upon the foregoing, the following order shall, therefore, be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for withholding of removal pursuant to Section 241(b)(3) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal pursuant to the Torture Convention be denied.

IT IS FURTHER ORDERED THAT any application or request for asylum pursuant to Section 208 of the Act must be pretermitted and denied.

IT IS FURTHER ORDERED that even if the respondent were eligible to apply for asylum that application must also be denied.

It is further ordered that the respondent's request for voluntary departure at conclusion of proceeding is denied.

It is further ordered that the respondent be removed from the United States to Pakistan on the charge contained in the Notice to Appear.

/s/ Philip Law
PHILIP LAW
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE PHILIP LAW, in the matter of:

RAMZAN ALI LAKHANI
A 79 008 101
Houston, Texas

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Susan K. Music/ST
Susan K. Music, Transcriber

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SUPREME COURT, U.S.

No. 06-1675

In the Supreme Court of the United States

RAMZAN ALI LAKHANI, PETITIONER

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's motion to reopen removal proceedings based on a claim of ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 06-1675

RAMZAN ALI LAKHANI, PETITIONER

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted at 223 Fed. Appx. 351. The decision of the Board of Immigration Appeals (Pet. App. 4-5) is unreported. The prior decision of the court of appeals (Pet. App. 9-18) is not published in the *Federal Reporter* but is reprinted at 162 Fed. Appx. 350. The prior decision of the Board of Immigration Appeals (Pet. App. 6-8) and the decision of the immigration judge (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2007. The petition for a writ of certiorari was filed on June 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, immigration to the United States is controlled by the issuance of immigrant visas, which are obtained from consular officers abroad under the authorization of the Secretary of State. See 8 U.S.C. 1154, 1201 (2000 & Supp. V 2005). The Attorney General has discretion to relieve an alien already in the United States of the need to travel abroad to obtain an immigrant visa by adjusting the alien's status to that of lawful permanent resident, if the alien was lawfully admitted to the United States and meets other requirements. See 8 U.S.C. 1255(a).[1] A favorable exercise of discretion to adjust an alien's status is "a matter of grace, not of right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

One of the requirements for adjustment of status is that "an immigrant visa [be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(3). An alien can satisfy that requirement by showing that a spouse who is a United States citizen has filed a visa petition for the alien's benefit and that the petition has been approved. See *INS* v. *Miranda*, 459 U.S. 14, 15 (1982) (per curiam). An alien may not obtain adjustment of status, however, on the basis of a marriage entered into while "administrative or judicial proceedings are pending regarding the alien's

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[1] Petitioner relies on 8 U.S.C. 1255(i), which enables a qualified alien to obtain adjustment of status without regard to how the alien entered the United States. See Pet. 2-3, 7, 24. Because petitioner appears to have been lawfully admitted to the United States, it is not clear why he has invoked Section 1255(i) rather than Section 1255(a). Which provision is the applicable one, however, has no bearing on the question presented in the certiorari petition.

right to be admitted or remain in the United States," unless the alien "establishes by clear and convincing evidence * * * that the marriage was entered into in good faith * * * and [that] the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant." 8 U.S.C. 1255(e). A regulation that implements 8 U.S.C. 1255 (2000 & Supp. V 2005) provides that, in the case of an alien who has been placed in removal proceedings, "the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file." 8 C.F.R. 1245.2(a)(1).

With exceptions not relevant here, an alien may file a motion to reopen removal proceedings "within 90 days of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). In *In re Arthur*, 20 I. & N. Dec. 475 (1992), the Board of Immigration Appeals (BIA) held that it would thereafter decline to grant motions to reopen for consideration of applications for adjustment of status "based upon unadjudicated visa petitions which fall within the ambit of [Section 1255(e)]," *id.* at 479—*i.e.*, in cases in which the marriage was entered into while removal proceedings were pending and the visa petition had not been approved. The BIA reaffirmed that holding in *In re H-A-*, 22 I. &. N. Dec. 728 (1999). In *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (2002), however, on the basis of revisions to policies governing motions to reopen, the BIA modified the holdings of *Arthur* and *H-A-*. *Velarde-Pacheco* held that, when a marriage has been entered into while removal proceedings are pending and a petition for an immigrant visa has not yet been adjudicated, "a properly filed motion to reopen *may* be granted, in the exercise of discretion, to provide an alien an oppor-

tunity to pursue an application for adjustment [of status]," but only if (1) the motion "is timely filed"; (2) the motion "is not numerically barred"; (3) the motion "is not barred * * * on * * * procedural grounds"; (4) the motion "presents clear and convincing evidence indicating a strong likelihood that the [alien's] marriage is bona fide"; and (5) the Immigration and Naturalization Service (INS)[2] "does not oppose the motion or bases its opposition solely on *Matter of Arthur*" (*i.e.*, on the ground that the visa petition has not been adjudicated). *Id.* at 256 (emphasis added).

2. Petitioner is a native and citizen of Pakistan. In October 1998, he entered the United States as a non-immigrant visitor. He was authorized to remain in the United States for one year, but remained in the country beyond that period. In March 2003, DHS commenced removal proceedings against petitioner, alleging that he was present in the United States in violation of law (see 8 U.S.C. 1227(a)(1)(B)). Petitioner conceded that he was removable, but applied for withholding of removal, on the ground that he would be persecuted if he returned to Pakistan. In the alternative, petitioner requested voluntary departure. Pet. App. 10, 19-20.

3. a. The immigration judge (IJ) found that petitioner was removable; denied his application for withholding of removal; and denied his request for voluntary departure. Pet. App. 19-30. In denying his application for withholding of removal, the IJ found that petitioner's evidence, including his testimony, was incredible, and that, even if it was not, it did not satisfy the legal stan-

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[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security (DHS). See 6 U.S.C. 251 (Supp. V 2005).

dards for withholding of removal. *Id.* at 20-28. In denying his request for voluntary departure, the IJ found that petitioner was disentitled to that form of relief because he had submitted fraudulent evidence. *Id.* at 28-29.

b. In November 2003, petitioner appealed the IJ's decision to the BIA. Pet. App. 12. While the appeal was pending, petitioner filed a motion to remand the case to the IJ for consideration of his application for adjustment of status. *Id.* at 8. The application was based on petitioner's marriage to a United States citizen in August 2004 and his wife's filing of a petition for an immigrant visa on petitioner's behalf. *Ibid.* In support of the motion to remand, petitioner submitted a copy of a visa petition that, according to petitioner, had been filed with DHS at the same time that he filed the motion to remand with the BIA (*i.e.*, in October 2004). Admin. R. 7, 64-65. Petitioner also submitted copies of other documents as evidence of his marriage.[3] DHS opposed the motion to remand, on the ground that petitioner had not presented clear and convincing evidence that his marriage was *bona fide*. Supp. Admin. R. 78 (citing *Velarde-Pacheco*, *supra*).

The BIA dismissed petitioner's appeal and denied his motion to remand. Pet. App. 6-8. In dismissing petitioner's appeal, the BIA affirmed the IJ's findings and

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[3] The documents included an apartment-lease agreement for April through November 2004 that was signed by petitioner and his wife; their marriage license; undated photographs apparently taken at the wedding; petitioner's wife's driver's license, which reflected that she had taken his surname; a September 2004 notice from a utility company, which also reflected that petitioner's wife had taken his surname; and credit cards indicating that petitioner and his wife had a joint account. Admin. R. 46-47, 49-60.

held that the IJ's conduct during the removal proceedings was not improper. *Id.* at 6-7. The BIA declined to consider whether the IJ erred in not granting a continuance based on a pending labor-certification application or lacked jurisdiction because the notice to appear was not issued by an authorized immigration officer, finding that neither issue had been pressed before or passed upon by the IJ. *Id.* at 8. In denying the motion to remand, the BIA explained that the requirements for a motion to remand are the same as those for a motion to reopen, and that a motion to remand for consideration of an application for adjustment of status, like a motion to reopen for that purpose, will not be granted when the alien's marriage to a United States citizen "was entered into after the commencement of proceedings" and the visa petition filed on behalf of the alien is "unadjudicated." *Ibid.* (citing *Arthur*, *supra*, and *H-A-*, *supra*). The BIA held that, because petitioner was married "after removal proceedings were initiated" and "there is no indication in the record or motion that the [visa petition] has been approved," petitioner "has not shown *prima facie* eligibility for adjustment of status." *Ibid.*

c. The court of appeals denied petitioner's petition for review. Pet. App. 9-18. The court rejected petitioner's contention that the IJ had violated his statutory and constitutional rights by failing to grant a continuance to allow petitioner to pursue relief related to his pending labor-certification application. *Id.* at 13-17.

4. In March 2006, petitioner filed a motion to reopen with the BIA. Pet. App. 4. The motion was based on the asserted "ineffective assistance of [petitioner's] prior counsel" and requested that the BIA remand the case to the IJ so that petitioner could "pursue adjustment of his status." Supp. Admin. R. 22, 25. In support of his

ineffective-assistance claim, petitioner alleged that prior counsel had filed the immigrant-visa petition with the wrong office (*i.e.*, "the Houston District Office of the U.S. Citizenship and Immigration Services" rather than "the Texas Service Center");[4] that the motion to remand filed by prior counsel was deficient (in some unspecified way); and that prior counsel had taken the wrong step after the motion to remand was denied (by filing a petition for review with the court of appeals rather than a motion to reconsider with the BIA). *Id.* at 23-24. In support of the motion to reopen, petitioner submitted additional evidence concerning his marriage.[5]

Petitioner also submitted a letter from prior counsel responding to the allegations of ineffective assistance. In the letter, prior counsel pointed out that, under *Velarde-Pacheco*, the BIA had no authority to remand the case because DHS opposed the motion to remand on the ground that petitioner had not established the *bona*

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[4] In the motion to reopen, petitioner stated that his wife had re-filed the visa petition with the correct office in February 2006. Supp. Admin. R. 24; see *id.* at 100-101.

[5] With the exception of a September 2004 bank statement reflecting a shared account apparently established during that month, an October 2004 utility bill in the name of petitioner's spouse, and a December 2004 credit-card bill indicating that petitioner had purchased airline tickets for himself and his wife, Supp. Admin. R. 152-153, 160, 162-163, the new evidence was from 2005 and 2006 (*i.e.*, it postdated the filing of the motion to remand). The evidence from 2005 and 2006 included 2004 and 2005 tax returns jointly filed by petitioner and his wife; a one-year apartment-lease agreement dated May 2005 that was signed by petitioner and his wife; utility bills from June 2005 and January 2006 in petitioner's wife's name; an insurance card from September 2005 reflecting a shared automobile policy; bank statements from November 2005 and January 2006 reflecting a shared checking account; and notarized statements from relatives dated February 2006. Supp. Admin. R. 121-126, 135-136, 138-146, 148-151, 158-159, 166-168.

fides of his marriage; that the only basis for the ineffective-assistance claim was therefore that prior counsel had not submitted sufficient evidence that the marriage was *bona fide* (such that DHS would not have opposed the motion on the ground that it was not); and that prior counsel had submitted all the evidence that petitioner provided him. Supp. Admin. R. 117-118.

DHS opposed petitioner's motion to reopen. Pet. App. 4. It took the position that, even if prior counsel had submitted sufficient evidence of a *bona fide* marriage, it would have opposed the motion to remand on another ground—namely, that petitioner presented fraudulent evidence at the removal hearing. Supp. Admin. R. 4-5.

The BIA denied the motion to reopen. Pet. App. 4-5. It held that the motion was untimely, because the motion was not filed within 90 days of the BIA's prior decision, and that equitable tolling was unwarranted, because petitioner failed to establish that his prior counsel rendered ineffective assistance. *Id.* at 4 (citing 8 C.F.R. 1003.2(c) and *Fajardo* v. *INS*, 300 F.3d 1018 (9th Cir. 2002)). The BIA explained that "an attorney's tactical decisions in the preparation and presentation of an alien's case before the [BIA] do not rise to the level of ineffective assistance of counsel," and that, in this case, "former counsel's decision to submit a petition for review before the * * * Fifth Circuit instead of filing a motion to reopen or reconsider with the [BIA] was a tactical decision that does not amount to ineffective assistance of counsel." *Id.* at 5 (citing *Magallanes-Damian* v. *INS*, 783 F.2d 931, 934 (9th Cir. 1986)). The BIA also explained that petitioner had not "alleged that his prior counsel had additional documentation regarding the bona fides of his marriage that could have been

submitted with his motion to remand for adjustment of status." *Ibid.* Finally, the BIA explained that petitioner had not "established that his prior counsel committed ineffective assistance before the [BIA], based upon his assertion that his prior counsel filed his visa petition * * * with the improper office of the DHS." *Ibid.*[6]

5. The court of appeals denied petitioner's petition for review in an unpublished per curiam opinion. Pet. App. 1-3.

The court first rejected petitioner's contention that the BIA violated his due-process rights when it denied his motion to reopen based on his claim of ineffective assistance of counsel. Pet. App. 1-2. The court explained that petitioner's ineffective-assistance claim "relates to the denial of his motion to remand to pursue an adjustment of status"; that an application for adjustment of status "is a request for discretionary relief" and thus "is not a right protected by due process"; and that, "[b]ecause counsel's alleged deficiencies merely restricted [petitioner's] chance of obtaining discretionary relief," petitioner "had no due process right to effective assistance in pursuit of that relief." *Id.* at 2 (citing *Gutierrez-Morales* v. *Homan*, 461 F.3d 605, 609 (5th Cir. 2006)).

The court next rejected petitioner's contention that the BIA abused its discretion when it denied his motion to reopen based on his claim of ineffective assistance of counsel. Pet. App. 2-3. The court explained that the motion to reopen was untimely, because it was filed more than 90 days after the final administrative deci-

[6] DHS records reflect that, in May 2006, approximately one month after the BIA's decision denying the motion to reopen, the immigrant-visa petition filed on petitioner's behalf was approved.

sion, and that petitioner was not entitled to equitable tolling of the 90-day period, because he failed to establish ineffective assistance of counsel. *Ibid.* (citing 8 C.F.R. 1003.2(c)(2)).

ARGUMENT

Petitioner renews his contention (Pet. 15-26) that the BIA abused its discretion in denying his motion to reopen the removal proceedings based on his claim of ineffective assistance of counsel. The court of appeals correctly rejected that contention, and further review is unwarranted.

1. As an initial matter, there is no basis in this Court's decisions for concluding that aliens in removal proceedings have a due-process right to the effective assistance of privately retained counsel. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the Government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution, because counsel's ineffectiveness can be "imputed to the State" only when the Constitution itself requires the provision of counsel. *Id.* at 754 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085-1086 (2007) (counsel's miscalculation of limitations period did not support equitable tolling, particularly in post-conviction context, where there is no constitutional right to counsel, even though State had

appointed counsel for prisoner in that case); *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary review by state supreme court of affirmance of conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant in every suit and every administrative proceeding is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted); accord *Stroe* v. *INS*, 256 F.3d 498, 499-501 (7th Cir. 2001) (Posner, J.). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962); see also *Lawrence* v. *Florida*, 127 S. Ct. at 1085-1086.[7]

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[7] In *In re Assaad*, 23 I. & N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004) (per curiam), the INS argued that, in light of *Coleman*, aliens have no due-process right to the effective assistance of counsel. The BIA declined to adopt that position, how-

2. Even if aliens in removal proceedings do have a due-process right to the effective assistance of privately retained counsel, as the court of appeals assumed here, there is no due-process right to the effective assistance of counsel in pursuit of discretionary relief, including the relief at issue in this case (*i.e.*, adjustment of status). The court below so held (Pet. App. 2), and its holding is correct.

As the Eleventh Circuit has explained, "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest." *Mejia Rodriguez* v. *Reno*, 178 F.3d 1139, 1146 (1999) (citing *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)), cert. denied, 531 U.S. 1010 (2000). For that reason, "an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for * * * a purely discretionary 'act of grace.'" *Id.* at 1148 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956), in turn quoting *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935)). Other courts of appeals have reached the same conclusion, including the Fifth Circuit, which so held in *Gutierrez-Morales* v. *Homan*, 461 F.3d 605, 609-610 (2006), the decision on which it relied here (Pet. App. 2); accord, *e.g.*, *Guerra-Soto* v. *Ashcroft*, 397 F.3d 637, 640-641 (8th Cir. 2005); *Dave* v. *Ashcroft*, 363 F.3d 649, 652-653 (7th Cir. 2004).[8]

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ever, because of precedent in the courts of appeals that recognizes such a right. *Id.* at 558-560.

[8] Petitioner argues (Pet. 16) that, because he sought withholding of removal before the IJ, and because withholding of removal is not a form of discretionary relief, he had a due-process right to the effective assistance of counsel throughout the proceedings even under the rule applied by the court of appeals. That argument is mistaken. Petitioner

There is reason to think that the Second and Ninth Circuits would reach a contrary conclusion. In *United States* v. *Copeland*, 376 F.3d 61 (2004), a case not involving a claim of ineffective assistance of counsel, the Second Circuit held that "a denial of an established right to be informed of the possibility of [discretionary] relief [from removal] can, if prejudicial, be a fundamental procedural error" under 8 U.S.C. 1326(d)(3), such that the defendant in an illegal-reentry prosecution can collaterally challenge the removal order. 376 F.3d at 72. And in *Fernandez* v. *Gonzales*, 439 F.3d 592 (2006), the Ninth Circuit stated, in dictum, that "ineffective assistance of counsel claims, which are predicated on the right to a full and fair hearing, are not affected by the nature of the relief sought." *Id.* at 602 n.8 (citation omitted). As far as we are aware, however, neither the Second Circuit, the Ninth Circuit, nor any other court of appeals has squarely held, in a published opinion specifically addressing the contrary argument, that an alien in removal proceedings has a due-process right to the effective assistance of privately retained counsel in pursuit of

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alleges that his prior counsel was ineffective only insofar as counsel sought to obtain adjustment of petitioner's status, and that form of relief is indisputably discretionary. See 8 U.S.C. 1255(a) ("[t]he status of an alien * * * may be adjusted by the Attorney General[] in his discretion"); 8 U.S.C. 1255(i)(2) ("the Attorney General may adjust the status of the alien"); see also *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) ("Because Jamieson is seeking the discretionary relief of adjustment of status, there is no constitutionally-protected liberty interest at stake."). An alien does not have a due-process right to the effective assistance of counsel in seeking a form of relief in which there is no liberty interest merely because the alien has also sought at least one form of relief in which there *is* such an interest.

discretionary relief.[9] In any event, this case would not be an appropriate one for resolving any such conflict, because, as explained below, see pp. 14-18, *infra*, petitioner could not prevail on his ineffective-assistance claims even if there were a due-process right to effective assistance of counsel in removal proceedings and even if that right extended to requests for discretionary relief.

3. Petitioner appears to raise three claims of ineffective assistance of counsel: that prior counsel filed a deficient motion to remand with the BIA; that, after the motion to remand was denied, prior counsel should have filed a motion to reconsider with the BIA rather than a petition for review with the court of appeals; and that prior counsel filed the immigrant-visa petition with the wrong office. See Pet. 7-10, 18-19; Supp. Admin. R. 23-25. Even assuming that there is a right to the effective assistance of counsel in removal proceedings, and that the right extends to requests for discretionary relief, an alien cannot prevail on an ineffective-assistance claim

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[9] The decisions on which petitioner relies (Pet. 15-16, 18-19) do not squarely conflict with the decision below. The Fifth Circuit's prior decision in *Haitian Refugee Ctr.* v. *Smith*, 676 F.2d 1023 (1982), did not involve a claim of ineffective assistance of counsel, and, in any event, this Court does not sit to resolve intra-circuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). The Ninth Circuit's decisions in *Siong* v. *INS*, 376 F.3d 1030 (2004), and *Mohammed* v. *Gonzales*, 400 F.3d 785 (2005), did involve a claim of ineffective assistance of counsel, but they did not specifically address the question whether such a claim is barred when the relief at issue is discretionary. The same is true of the Ninth Circuit's decision in *Cortez-Herrera* v. *Gonzales*, No. 04-75735, 2007 WL 1482395 (May 22, 2007), which in any event is unpublished. Since those decisions did not "squarely address[] the issue," and "at most assumed the applicability" of ordinary ineffective-assistance principles when the alien seeks discretionary relief, the Ninth Circuit would be "free to address the issue" *de novo* in future cases. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993).

unless "the representation afforded [hi]m was so deficient as to impinge upon the fundamental fairness of the hearing," and, "as a result, the alien suffered substantial prejudice." *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) (quoting *Paul* v. *United States INS*, 521 F.2d 194, 198 (5th Cir. 1975), and citing *Ogbemudia* v. *INS*, 988 F.2d 595, 598 (5th Cir. 1993)); see Pet. 16 (acknowledging that, "in order to assert ineffective assistance of counsel," an alien "must show: (1) that counsel failed to perform with sufficient competence, and (2) that the petitioner was prejudiced by counsel's performance"). "Prejudice," in this context, means that the alien "would have been entitled to [the] relief [sought]" if his counsel had not performed deficiently. *Miranda-Lores* v. *INS*, 17 F.3d 84, 85 (5th Cir. 1994); see Pet. 22 (acknowledging that, to establish prejudice, alien must make "strong showing," or at least demonstrate "reasonable likelihood," that result would have been different had counsel not performed deficiently). In denying the motion to reopen, the BIA held that petitioner could not make the required showing with respect to any of his ineffective-assistance claims. Pet. App. 5. As explained below, that holding is correct.

Petitioner repeatedly asserts (Pet. 9-10, 18-19, 23-26) that the motion to remand was deficient because it did not comply with the requirements of *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002). He does not say which requirement he has in mind, but presumably it is the fourth: that the motion "present[] clear and convincing evidence indicating a strong likelihood that the [alien's] marriage is bona fide." *Id.* at 256. Petitioner's prior counsel did not perform deficiently in attempting to satisfy that requirement, because prior counsel maintains that he submitted all the documenta-

tion that petitioner provided him, Supp. Admin. R. 117-118; see note 3, *supra* (describing documents submitted with motion to remand), and petitioner does not dispute that claim. As the BIA explained in denying the motion to reopen, petitioner "has not alleged that his prior counsel had additional documentation regarding the bona fides of his marriage that could have been submitted with his motion to remand for adjustment of status." Pet. App. 5.

Even if petitioner *had* made such an allegation, the only additional documentation identified by petitioner that existed at the time of the filing of the motion to remand would not have materially strengthened the case that his marriage was *bona fide*. See note 5, *supra* (describing evidence submitted with motion to reopen). There is thus no reason to suppose that, had the additional evidence been submitted in support of the motion to remand, DHS would have decided not to oppose the motion on the ground that petitioner had not presented clear and convincing evidence that his marriage was *bona fide*. See Supp. Admin. R. 78 (opposing motion to remand on that ground). And even if the evidence *had* been sufficient to establish the *bona fides* of petitioner's marriage, DHS would have opposed the motion to remand on the independent ground that petitioner presented fraudulent evidence at the removal hearing, as DHS made clear in opposing petitioner's motion to reopen. Supp. Admin. R. 4-5. Since, under *Velarde-Pacheco*, the BIA has no discretion to grant a motion to remand for consideration of an application for adjustment of status when DHS opposes the motion on a ground other than that the visa application has not been approved, see 23 I. & N. Dec. at 256, the motion to remand would not have been granted even if the additional

documentation had been submitted. Accordingly, even if petitioner could demonstrate that his prior counsel performed deficiently in filing the motion to remand, he could not demonstrate prejudice.[10]

Petitioner's prior counsel did not render ineffective assistance in deciding not to file a motion to reconsider for the same reasons that he did not render ineffective assistance in filing the motion to remand. Because there is no indication that prior counsel had any more evidence of the *bona fides* of petitioner's marriage in February 2005, when the motion to remand was decided, than in October 2004, when the motion to remand was filed, prior counsel did not perform deficiently in deciding not to file a motion to reconsider. And because, even if prior counsel had filed a motion to reconsider with the additional documentation that was then available, it is clear that DHS would have opposed a remand on a ground other than that the visa application had not been approved, petitioner cannot demonstrate prejudice from the decision not to file a motion to reconsider.[11]

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[10] Contrary to petitioner's assertion (Pet. 19-23), the filing of a deficient motion to remand is not prejudicial per se. Petitioner relies (Pet. 19-20) on *Chike* v. *INS*, 948 F.2d 961 (5th Cir. 1991), but, unlike the alien in that case, who was unable to file a brief before the BIA because he was not given notice of the briefing schedule, *id.* at 961-962, petitioner was not "denied the opportunity to be heard before the [BIA]," *id.* at 962. The BIA considered petitioner's motion to remand and denied it on the merits. Pet. App. 8.

[11] It is not clear that an alien is even *permitted* to include supporting documentation with a motion to reconsider. The regulations provide that, unlike a motion to reopen, which "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material," 8 C.F.R. 1003.2(c)(1), a motion to reconsider "shall state the reasons for the

Finally, any error in the filing of the immigrant-visa petition with DHS does not give rise to a due-process claim of ineffective assistance of counsel. The right assumed to exist by the court of appeals is the "constitutional right to effective counsel *in removal proceedings*." Pet. App. 2 (emphasis added); accord, *e.g.*, *Gutierrez-Morales*, 461 F.3d at 609. As the BIA explained in denying petitioner's motion to reopen, petitioner cannot "establish[] that his prior counsel committed ineffective assistance [in removal proceedings] before the [BIA]"—a part of the Executive Office for Immigration Review in the Department of Justice—"based upon his assertion that his prior counsel filed his visa petition * * * with the improper office of the DHS." Pet. App. 5. And no circuit precedent of which we are aware holds that an alien has a due-process right to the effective assistance of counsel in filing a petition for a visa with DHS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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motion by specifying the errors of fact or law in the prior [BIA] decision and shall be supported by pertinent authority," 8 C.F.R. 1003.2(b)(1).